

No. 16345

IN THE
United States
Court of Appeals
For the Ninth Circuit

GERMANA E. PRAIDO DEL CASTILLO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Upon Appeal from the United States District Court for
District of Arizona.

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INTRODUCTION

Appellant, Plaintiff below, will be designated as Appellant herein. The United States of America, Defendant below, will be designated as the Government.

The Transcript of Record will be abbreviated (TR).

REPORT OF OPINION BELOW

There was no written or oral opinion delivered by the Honorable James A. Walsh, United States District Judge, presiding. The Order granting the Government's Motion to Dismiss was based on briefs and oral arguments made by counsel for both parties.

JURISDICTION

The Appellant brought this action in the Federal District

Court after a denial of her claim for gratuitous National Service Life Insurance benefits (TR 21) by the Veterans Administration.

38 U.S.C. 817, which incorporated by reference 445, gave the District Court jurisdiction.

28 U.S.C. 1291 gives this Honorable Court jurisdiction over appeals from all final decisions of District Court. The Judgment entered December 12, 1958, is a final decision. (TR 40).

STATEMENT OF FACTS

On February 24, 1958, Appellant filed her Complaint followed by the filing of an Amended Complaint on May 6, 1958. (TR 3 - 9).

Appellant's Complaint (Count No. 1) prayed for full benefits due and payable under 38 U.S.C. 802 for automatic gratuitous life insurance. (TR 9). Appellant's Complaint (Count No. 2) also requested benefits due and payable under death gratuity compensation as provided in 38 U.S.C. 1131 - 1134. (TR 9). Count No. 2 was dismissed by Stipulation on August 26, 1958. (TR 24).

Government filed a Motion to Dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted. (TR 13).

For use in preparing and arguing this Motion the following Stipulation of Facts were entered into by the parties (TR 13):

1. Prescillano E. Praid entered service with the Armed Forces of the United States in the Philippine Islands on September 1, 1941. He was killed on April 3, 1942;

2. VA Form 1557, a claim for gratuitous National Service Life Insurance, was signed by the plaintiff on April 29, 1948, and filed with the Veterans Administration on June 11, 1948;

3. Plaintiff filed a claim for death compensation benefits, which claim was disallowed on September 10, 1952. Plaintiff

filed an appeal from the disallowance of her compensation benefits which appeal was denied by the Board of Veterans Appeals.

On August 15, 1958, Appellant filed a Cross-Motion for Summary Judgment, And In Opposition to Motion to Dismiss with accompanying Affidavits and Exhibits attached thereto. (TR 16-23).

Government filed Motion in Opposition to Cross-Motion for Summary Judgment. (TR 25).

On September 29, 1958, the Court entered an Order denying Government's Motion to Dismiss and denying Appellant's Cross-Motion for Summary Judgment. (TR 26).

On October 21, 1958, the Court entered an Order vacating the Order of September 29, denying the Government's Motion to Dismiss and further ordered that Government's Motion to Dismiss is granted, (TR 27).

Appellant filed Motion to file an additional Amended Complaint and Motion to Alter to Amend Judgment. (TR 28).

Government filed Motion in Opposition to Appellant's Motion for Leave to File Amended Complaint and Motion to Alter or Amend a Judgment. (TR 38).

Appellant's Motion for Leave to File Second Amended Complaint was denied by Order of Court on December 1, 1958. (TR 39).

Judgment was entered on December 12, 1958, that Appellant take nothing by her Amended Complaint and that same be dismissed. (TR 40).

Many of the facts set forth in Appellant's Statement of Facts are evidentiary matters that the Government feels have no place in this appeal, which is based on a jurisdictional question. (Appellant's Brief, pages 7, 8, 9). We are, therefore, not referring to same in our statement and by so doing are not admitting or conceding in any way that these facts are true as set forth therein.

ARGUMENT OF SPECIFICATION OF ERROR I.

The Government filed its Motion to Dismiss for the reason that the District Court did not have jurisdiction and that Appellant failed to state a claim (TR 13) basing the Motion on the Stipulation of Facts and facts set forth in the Appellant's Amended Complaint. The only theory the Government relied on in its motion was a jurisdictional question as to whether or not the suit was barred by the statute of limitations. This is best shown in the Transcript of Government's Motion in Opposition to Motion for Leave to File Amended Complaint (TR 38):

"That the proposed Amended Complaint, the granting of which is in the discretion of the Court, would not cure the jurisdictional defect of the First Amended Complaint heretofore dismissed by the Court, in that the plaintiff's claim for gratuitous insurance benefits is barred by the limitation provisions of Title 38 U.S.C. 445, incorporated by reference in Section 817 of the same Title and made applicable to suits for recovery of National Life Insurance benefits."

The brief filed by the Government in support of its Motion to Dismiss and the oral argument made by the Government's counsel discussed only this jurisdictional question. When the Government based its Motion in part on the Appellant's Amended Complaint it was referring only to the facts that would relate to this jurisdictional question. However, if there was any misunderstanding on behalf of counsel for Appellant concerning this question it was clarified by Government's Motion in Opposition to Appellant's Cross-Motion for Summary Judgment (TR 25) in which the Government states as follows:

"The attorney for the plaintiff herein states as a fact in his Motion that the plaintiff was the last person to stand in *locos parentis* to the deceased serviceman. If the Motion to Dismiss, filed by the Government, is denied this question is a genuine issue to a material fact which must be determined by the Court. Exhibit (A) and (B) attached to plaintiff's Motion plainly shows a dispute on this point. A Motion for Summary Judgment should, therefore, not be granted since a genuine issue of fact material to the dispute by the parties exists.

Federal Rules of Civil Procedure, Rule 56 (c)."

We sincerely regret the misunderstanding of Appellant's counsel on this matter but feel there can be no question that at the time set for oral argument the Appellant was well informed as to the Government's position by the above Motion and by a discussion of the matter before the Court.

ARGUMENT II.

The Appellant's claim for gratuitous Insurance benefits is barred by the limitation provisions of Section 445 of Title 38 U.S.C., incorporated by reference in Sec. 817 of the same Title and made applicable to suits for recovery of National Service Life Insurance.

38 U.S.C. 802 (d) (5) relied upon by the Appellant is not a jurisdictional statute but rather one which precludes the Veterans Administration from administratively allowing a claim for such benefits unless it is filed in the Veterans Administration within seven (7) years following the death of the serviceman. It is Section 445 of Title 38 U.S.C. which grants jurisdiction to the

District Courts to hear and determine *suits* against the United States for gratuitous insurance benefits and this section prescribes a *six year* period of limitations.

The legislative history of 38 U.S.C.A. 802 (d) (5) shows that originally only one year was allowed in which claim could be filed with the Veterans Administration. In 1944 this subsection was amended to allow five years in which to file a claim, and in 1948 it was again amended to extend the period for filing a claim from five to seven years. S. Rep. 902, 80th Cong., accompanying the bill effecting this latter change makes it clear that Congress had in mind the situation of claimants, such as the Appellant, who resided in the Philippine Islands. It is significant, that although Congress twice extended the time in which claims could be filed with the Veterans Administration, it did not see fit to extend the period allowed for bringing suit in the District Courts. Had Congress intended to give an additional period of time in which to bring such actions, it would have provided therefor by specific legislation, and Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. *Soriano v. United States*, 352 U.S. 270, 276. Compare *United States vs. Sherwood*, 312 U.S. 584, 590, 591, wherein the Court stated:

“*** Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations, and conditions upon which the Government consents to be sued *must be strictly observed and exceptions thereto are not implied.*” (Emphasis supplied).

The case of *De Yaranon v. United States*, 152 F. Supp. 644, is a case similar to the one herein involved wherein the Court considered the application of the limitation provision of 38 U.S.C.

445 and dismissed the plaintiff's Complaint for want of jurisdiction. Additional citations supporting this proposition are:

Lynch vs. United States, 80 F. 2d. 418 (C.A. 5), cert. den. 298 U.S. 658;

Morgan vs. United States, 115 F. 2d. 427, (C.A. 5), cert. den. 312 U.S. 701;

Goldsborough vs. United States, 31 F. Supp. 93.

The Appellant's claim was not filed with the Veterans Administration until June 11, 1948 (TR 14), more than six years after the happening of the contingency upon which the claim was founded, that is the death of her brother on April 3, 1942. (TR 14).

38 U.S.C. 445 provides for a suspension of the running of the limitation period during the time elapsing between the filing in the Veterans Administration of the claim for insurance benefits and the final administrative denial of the claim by that agency. However, as above indicated, in the instant case, the serviceman died on April 3, 1942, (TR 14) and claim for the gratuitous insurance benefits was not filed with the Veterans Administration until June 11, 1948, (TR 14), more than six years later. Therefore, even at the time that the claim was filed, the limitations period had run, and no suit in the Federal District Court could thereafter be brought. Congress was aware of the need for more time to allow beneficiaries in the Philippine Islands to apply for the benefits provided for by 38 U.S.C. 802 (d) (5), and Congress could have also extended the time in which suit could be filed. The fact that Congress did not see fit to extend the limitations period, but only the time within which a claim could be filed with and paid administratively by the Veterans Administration, can mean only that it intended that the period in which suit could be filed for National Service Life Insurance benefits should be six years and no more. The claimant's right to sue is

subject to such conditions as Congress sees fit to impose, including restrictions as to time, place and manner of suit.

Reid vs. United States, 211 U.S. 529; 29 S. Ct. 171; 53 Law Ed. 313;

United States vs. Sherwood, *supra*;

Munro vs. United States, 303 U.S. 36; 58 S. Ct. 421; 82 Law Ed. 633;

Dalehite vs. United States, 346 U.S. 15; 73 S. Ct. 956; 97 Law Ed. 1427.

ARGUMENT III.

The Japanese occupation of the Philippine Islands did not toll the running of the statute of limitations.

This exact question is decided in the case of *Soriano vs. United States*, 352 U.S. 270 at 275, 276: The Appellant also quotes this case in support of the proposition that the existence of hostilities during the Japanese occupation of the Philippines did toll the statute of limitations. However after a careful reading of the case there can be no question that the case stands for the exact reverse of the Appellant's contention. On page 275 we quote from the Court's opinion in the *Soriano* case, *supra*:

“***. The cause of action as alleged by petitioner was for just compensation for supplies, etc., taken from him by guerrillas during the Japanese occupation of the Philippines. He alleges in his complaint that the action, if any he has, accrued at the time of the taking and could only be maintained within six years thereafter but for the existence of the hostilities which he claims tolled the statute. He depends on *Hanger vs. Abbott*, 6 Wall. 532 (1868), to sup-

port this position. Such reliance is misplaced. That case involved private citizens, not the Government. It has no applicability to claims against the sovereign.

See *Haycroft vs. United States*, 22 Wall. 81 (1875).

To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, alien property litigation, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *United States vs. Sherwood*, 312 U.S. 584, 590-591 (1941), and cases there cited."

CONCLUSIONS

38 U.S.C. 445 grants jurisdiction to the District Court to hear and determine suits against the United States for gratuitous insurance benefits and a six-year period of limitations is set forth therein. The law is well settled that the time limitation is a con-

dition precedent to the Court's jurisdiction.

The Japanese occupation of the Philippine Islands did not toll the running of the statute of limitations.

It is respectfully submitted that the Court Order in granting Government's Motion to Dismiss for lack of jurisdiction was correct since the six-year period of limitations had run prior to the time the original claim was filed with the Veterans Administration, and the Government respectfully requests that this Court affirm the ruling made by the Trial Court.

Respectfully submitted,

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